(1)

No. 90-471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WPIX, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

May an employer lawfully declare that an impasse has been reached in collective bargaining after the collective bargaining process has been stalled and prolonged through the extensive use of dilatory tactics by the union?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

In addition to the parties named in the caption, the following entity was an intervenor in the court of appeals on behalf of the National Labor Relations Board, petitioner-cross respondent below and respondent here:

Newspaper Guild of New York, Local 3, AFL-CIO

Pursuant to Rule 29.1 of the Rules of this Court, petitioner WPIX, Inc. furnishes the following information:

Parent companies of WPIX, Inc.:

Tribune Company
Tribune Broadcasting Company

Subsidiary of WPIX, Inc.:

CBC Broadcasting, Inc.
(formerly Connecticut Broadcasting Company)

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WPIX, INC.,

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WPIX, Inc. ("WPIX" or the "Company") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-12) is reported at 906 F.2d 898 (2nd Cir. 1990). The decision and order of the National Labor Relations Board, cited as *WPIX, Inc.*, (App., *infra*, 13-52) is reported at 293 NLRB No. 2.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1990. The court of appeals denied WPIX, Inc.'s petition for rehearing on August 8, 1990 (App., *infra*, 53-54). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5):

> (a) It shall be an unfair labor practice for an employer:
>
> > . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

STATEMENT OF THE CASE

In a purposeful strategy to avoid meaningful negotiations and thus perpetuate the terms and conditions set forth in an expired collective bargaining agreement, the Newspaper Guild of New York, Local 3, AFL-CIO (the "Union" or the "Guild") repeatedly caused substantial delays between meetings—resulting in only thirteen meetings in nine months, delayed scheduled meetings—resulting in shorter sessions than planned, terminated scheduled

meetings after abbreviated periods, and wasted precious bargaining time by discussing extraneous matters and by calling for repeated discussion of relatively minor issues. After nine months of negotiation, the parties were no closer to agreement on any critical management flexibility or economic issue than they had been at the commencement of negotiations. Indeed, as of April 1, the parties were further apart rather than closer together on these issues. At that point, because of the Union's continued use of dilatory tactics and the total lack of progress, further bargaining would have been futile and the Company declared impasse.

The relevant facts are largely undisputed. (App., *infra*, 3) WPIX and the Union met thirteen times between July 6, 1986 and April 1, 1987 in an unsuccessful attempt to negotiate a successor contract to the collective bargaining agreement which expired on June 24, 1986. Throughout the nine months of negotiation the Guild engaged in numerous and repeated dilatory actions calculated to avoid negotiation of a new contract and to perpetuate the terms of the expired contract.

The dilatory tactics, as summarized below, essentially fall into two categories, *i.e.*, unavailability to meet or delay of meeting and the superficial "talking technique" of negotiations:

> a. Following the third negotiation session on August 13, the spokesperson for the Company, Andrew Hughes, sent a letter to the spokesperson for the Guild, William Montes, urging him to set a date prior to September 16 for continued negotiations. Not only did the Union not agree to an earlier date but "a long series of events" caused the September 16 date to be rescheduled to October 1, resulting in a delay of *one and one-half months* between sessions.

b. When Guild spokesperson, Sidney Kress (substituted for Montes), requested adjournment of the October 1 meeting, Company spokesperson, Richard Marcus (substituted for Hughes), indicated a desire to meet as soon as possible. Kress stated that he was not available until October 17, *more than two weeks later.*

c. The meeting of October 17 was cancelled on October 16 because of Kress' alleged illness. The commitment that Kress would contact Marcus the next week was never honored.

d. When Marcus contacted Kress on Wednesday, October 22 to inquire about the delay and urge prompt rescheduling of the next meeting, Kress informed Marcus that he no longer represented the Union and that Leo DuCharme would take his place.

e. Although Kress promised Marcus that DuCharme would call him the following week of October 27, DuCharme made no attempt to contact Marcus that next week or the following week.

f. Though the Union's representatives were repeatedly unavailable for negotiations and repeatedly neglected to honor commitments to contact Marcus to arrange future meetings, "former representative" Kress found time to prepare correspondence demanding arbitration over one of the key issues (step increases) which separated the parties in their negotiations.

g. In a letter to Marcus dated November 14, 1986, received November 18, 1986, DuCharme finally submitted three dates for negotiations, the earliest being November 26, the day before Thanksgiving and almost *two months* after the previous October 1 session.

h. On November 24, 1986, James Madden, Union business representative, contacted Marcus to cancel the meeting on November 26 because, *inter alia*, of DuCharme's involvement in other business on that

date which DuCharme himself had previously offered. As a result, the Union did not make itself available to meet with the Company for the *two and one-half months* between October 1 and December 12, 1986.

i. On December 12, DuCharme asked to devote a substantial portion of the next meeting (scheduled for December 16) to a discussion of grievance rather than negotiation matters. On December 16, that discussion was delayed due to William O'Meara's (Guild steward) exceedingly late arrival. Once the grievance discussion commenced, it exhausted most of the time available for negotiations.

j. When the Union adjourned the December 16 meeting, Marcus proposed to meet the next day. DuCharme refused indicating that January 13, *almost a full month later*, was his first available date.

k. On January 13, the Union insisted upon a lengthy discussion of the Company-wide bereavement policy (hardly a "major" issue), specifically the Union's proposal to include in-laws in the paid leave policy.

l. On January 20, DuCharme did not arrive for negotiations until 3:00 p.m., allowing less than one hour for negotiation. During this abbreviated negotiation session, DuCharme insisted on again discussing the in-law issue. In addition, he asked Marcus to restate the Company's position on each of the grievances discussed and answered at the December 16 meeting.

m. Upon the Union's adjournment of the February 6 session, Marcus expressed his desire to continue the negotiation as soon as possible. DuCharme indicated that he was not available until February 26 and 27, *almost three weeks later*. When the mediator indicated that he was not available on those dates, DuCharme indicated an unwillingness to meet without the mediator. DuCharme then changed his position by stating that if he did negotiate on the 26th he could not negotiate on the 27th.

n. The Union spent a substantial amount of time at the meeting on February 26 discussing asbestos contamination in a construction zone *completely separated from its members' work area.* They insisted upon inspecting the area and engaging in long discussions about asbestos removal and the assurances and notices to be given to employees.

o. On April 1, 1987, the Union spent virtually the entire session asking the Company to explain the reasons for certain proposals, reasons which had already been explained and reviewed in detail.

p. The Union consistently called for early adjournment of negotiation sessions.

q. When the Union announced adjournment on April 1, 1987, Marcus expressed the Company's strong desire to meet the next day. DuCharme refused, indicating that he was not available until late on April 21 or at the regular time on April 22, a *full three weeks later.*

The Union learned of the Company's difficult financial condition as early as the first negotiation session on July 1, 1986. The Company's specific cost proposals, including the proposal to eliminate step increases, were communicated to the Union orally on August 6 and, to some degree, in writing on August 13. The Company's final wage proposal was submitted on October 1. The Union did not submit any wage proposal until April 1, 1987 when it proposed three annual 8% increases.

The Union filed a charge with the National Labor Relations Board (the "Board") claiming that the Company declared a premature impasse. Sustaining that charge, the Board applied to the court of appeals for enforcement of its order, and WPIX cross-petitioned to set aside the order, pursuant to Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*

REASONS FOR GRANTING THE PETITION

THE COURT OF APPEALS FAILED TO ADDRESS AN IMPORTANT QUESTION OF FEDERAL LABOR LAW—THE EFFECT OF THE GUILD'S DILATORY ACTIVITY ON THE EXISTENCE OF BARGAINING IMPASSE IN THIS CASE.

This case involves a question of exceptional importance for federal labor law: At what point may an employer properly declare an impasse when the bargaining process is being flagrantly stalled and manipulated by a union through the extensive use of dilatory tactics.

The Court of Appeals overlooked virtually all of the critical facts regarding the Guild's dilatory activities—its delays between meetings resulting in only 13 sessions in nine months, its delays of scheduled meetings resulting in shorter sessions than planned, and its waste of precious bargaining time by discussing extraneous matters and by calling for repeated discussion of relatively minor issues.

Without discussion, the court of appeals concluded that the Guild's dilatory tactics were not dispositive with regard to the existence of a lawful bargaining impasse. (App., *infra*, 9-10). To the contrary, the prevailing law throughout the circuits, including the Second Circuit, provides that such activity supports the existence of lawful impasse in this case.

In response to WPIX's argument that because the parties were further apart on all critical economic and management flexibility issues on April 1, the Company was justified in declaring impasse, the court of appeals queried: "If—as the Company claims—all parties knew those key economic issues could not be resolved, one might well wonder why the parties would have bothered to discuss

in the meantime what the Company now dismisses as insignificant issues." (App., *infra*, 8). The answer to the court's query lies in the Guild's purposely dilatory activity. While the Company was willing at all times to discuss all bargaining issues, including economic issues, and continued meeting with the Union in the hope that some progress would be made, the Guild engaged in a purposeful strategy to avoid such progress. Because of the Union's continuing dilatory strategy, it was apparent on April 1 that further bargaining would be futile.

The facts indicate that once the Union became aware of the Company's financial position and its concomitant need to reduce costs and increase flexibility, it began to engage in dilatory tactics. Following the August 13 meeting, the Union avoided meeting with the Company with the result that the parties met only once in the four months between August 13 and December 12. Further, due entirely to the Union's dilatory tactics, the parties met only 13 times in nine months. Many of those meetings consisted of only very brief negotiation sessions with excessive delays and time spent on extraneous matters concocted by the Union to delay negotiations.

The Second Circuit condemned similar behavior in *N.L.R.B. v. Milgo Industrial, Inc.*, 567 F.2d 540 (2d Cir. 1977). There the court of appeals held that such behavior on the part of the company's attorney-spokesperson, *viz.* cancelling scheduled bargaining sessions, causing gaps of one to three months, with the result that the parties met only 17 times over the course of 15 months and then usually only for a few hours, constituted "sham bargaining" and violated the statutory duty set forth in Section 8(d) to "meet at reasonable times." *Id.* at 545, 546.

Additionally, the Guild spent an inordinate amount of time discussing, questioning and considering the Com-

pany's proposals, asking the same questions over and over again to "buy time," offering only one minor counter-proposal which did not result in agreement. Use of such "talking techniques" precludes a finding of premature impasse.

While the proviso to Section 8(d) allows that the obligation to bargain in good faith does not compel either party to agree to a proposal or make a concession, "the prime way for a party to avail itself of the proviso is to declare an impasse after the failure of sincere efforts to resolve the issue and to face the consequences—not to engage in a play, or a ploy. Bad faith bargaining . . . 'is prohibited though done with sophistication and finesse . . . [T]o sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail.' " *Id.* at 543, quoting *N.L.R.B. v. Herman Sausage Co.*, 275 F.2d 229, 232 (5th Cir. 1960). See also *N.L.R.B. v. Cambria Clay Products, Inc.*, 215 F.2d 48, 55 (6th Cir. 1954), quoting *N.L.R.B. v. Remington-Rand, Inc.*, 94 F.2d 862, 872 (2d Cir. 1938) (L. Hand, J.) (" 'A union may at times seek to give the appearance of wishing to treat, after it knows that all chance of agreement is gone; in such conflicts each side generally wishes to place the odium of rupture upon the other.' "); *N.L.R.B. v. Cable Vision, Inc.*, 660 F.2d 1, 4 (1st Cir. 1981) ("[T]he mere statement that a party will 'study' and 'consider' proposals, repeated *ad infinitum* and combined with other evidence of deliberate delay, gives the impression of a party which is attempting to avoid rather than to induce agreement.")

The Union's dilatory activities are dispositive here; they bar any challenge by the Union to the Company's declaration of an impasse. *Continental Nut Co.*, 195 NLRB 841,

857-58 (1972). While the Union is entitled to certain rights under the Act, it "may not use them as a cloak" to avoid meaningful bargaining. *N.L.R.B. v. Herman Sausage Co.*, 275 F.2d at 232. The Union may not go "through the motions of negotiations as an elaborate pretense with no sincere desire to reach an agreement . . . " *N.L.R.B. v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953).

Moreover, the Union is not in a position to argue that it did not have enough time to bargain over critical issues because the record makes it clear that the Union avoided numerous opportunities to meet more often during the nine months of negotiation. Because of these dilatory activities, the parties were unable to reach agreement on any issues in nine months—a more than ample period of negotiation. Had the Company not declared impasse on April 1, 1987, the Guild's dilatory tactics would have continued indefinitely, and the Union would have achieved its goal—perpetuation of the terms of the expired agreement.

The Board, in its brief to the court of appeals, essentially admitted to such dilatory tactics on the part of the Guild, claiming that such tactics were justified to preserve the status quo if that represented, in the Union's view, the best that it could achieve. The Guild's delaying tactics, the Board further argued, were lawful so long as the delay did not interfere with the bargaining process. Such interference certainly occurred in this case. By preventing more frequent meetings over the nine months and by actively avoiding meaningful discussions, the Guild prevented progress that otherwise could have been made during the long period of negotiations. The Company, with no reason to believe that such dilatory activity was at

an end—or even on a decline—was therefore justified in declaring an impasse. If the Company had not done so, the Guild would have continued to meet sporadically and indefinitely with no real intent to negotiate a new agreement.

An employer should not be forced to sit at the bargaining table "almost forever" in the face of a "purposeful strategy to make bargaining futile or fail". *N.L.R.B. v. Milgo Industrial, Inc.*, 567 F.2d at 543. Such dilatory strategy is dispositive; it clearly precludes a finding of premature impasse in this case.

Review by this Court is essential. By failing to consider the impact on the bargaining process of the extensive dilatory tactics demonstrated by the Union here, the court of appeals has left employers powerless in the face of blatant union attempts to avoid agreement. Such a result tips the balance of labor-management relations in favor of labor—a result contrary to the policies of the National Labor Relations Act and federal labor law. The Court should review this case and restore the fine balance necessary to maintain the validity of the collective bargaining process and thereby enhance positive labor relations throughout the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 13, 1990

APPENDIX

App. 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 927, 928—August Term, 1989

(Argued March 2, 1990 Decided June 25, 1990)

Docket Nos. 89-4136, 4142

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Cross Respondent,

—v.—

WPIX, INC.,

Respondent-Cross Petitioner,

NEWSPAPER GUILD OF NEW YORK,
LOCAL 3, AFL-CIO,

Intervenor.

Before:

OAKES, *Chief Judge,*
KEARSE and WALKER, *Circuit Judges.*

Petition by National Labor Relations Board for enforcement of order against employer, finding that employer had

violated sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (5) (1988), and cross-petition of employer to vacate order.

Petition granted and cross-petition denied.

JOSEPH H. BORNONG, Attorney, NLRB (Howard E. Perlstein, Supervisory Attorney; Jerry M. Hunter, General Counsel; Robert E. Allen, Associate General Counsel; Aileen A. Armstrong, Deputy Associate General Counsel, NLRB, Washington, D.C., of counsel), *for Petitioner-Cross Respondent.*

RICHARD L. MARCUS (Susan M. Benton-Powers, Sonnenschein Carlin Nath & Rosenthal, Chicago, IL., of counsel), *for Respondent-Cross Petitioner.*

Irwin Bluestein, Stuart E. Bauchner, Vladeck, Waldman, Elias & Engelhard, P.C., New York, New York, of counsel, *submitted a brief for Intervenor.*

WALKER, *Circuit Judge:*

On February 28, 1989, the National Labor Relations Board ("the Board") found that WPIX, Inc. ("the Company") had violated sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (5)

("the Act"), by unilaterally implementing changes in terms and conditions of employment without first bargaining to an impasse with intervenor Newspaper Guild of New York, Local 3, AFL-CIO ("the Union"), and by refusing to pay contractually required wage-step increases. Because we find that substantial evidence on the record as a whole supports the Board's findings, we enforce its order.

BACKGROUND

The underlying facts are largely undisputed. They are based on careful findings by the Administrative Law Judge who explicitly evaluated the credibility of the witnesses.

WPIX operates a television broadcasting station in New York City. Since 1972, the Union has represented certain employees who write and edit news programs produced by the station. The most recent collective bargaining agreement between the parties ran until June 24, 1986 ("the Agreement"). It provided that its terms would remain in effect until negotiations for a successor agreement were lawfully terminated. Article XVII of the Agreement required the Company to grant employees periodic step increases in pay after specified periods of service. On April 24, 1986, the Union informed WPIX that it wished to negotiate changes in the Agreement. Significantly, the Union requested, among other things, a "substantial"—although unspecified—wage increase. Over the course of the next nine months, the parties held twelve meetings, which need only be summarized here.

The parties' first meeting occurred on July 1, 1986, and addressed, among other issues, the Company's decision

to lay off certain Union members shortly before the negotiations began. The Company said it was "not thrilled about" the Union's written proposal, but the Company had no written proposal of its own. At subsequent meetings on July 22, again on August 8 and again on August 13, the parties addressed such matters as the step increases and the employees' dental plan, and the Union explained that it considered the step increase an "integral part" of the Agreement. Despite the Union's request for a wage increase, by the fourth meeting the Company still had not offered even a preliminary wage proposal. According to the Company's representative, the subject of wages was "always sort of deferred in [the] first three meetings." Although he thus recognized that a significant outstanding issue had not even been addressed, the Company's representative nonetheless volunteered at the August 13 meeting that it appeared that the parties were bargaining towards impasse—a conclusion the Union quickly rejected.

At the next meeting on October 1, the Company presented its proposal, which envisioned twenty modifications to the Agreement and a slight increase in wages. Also at that meeting, the Union broached the Company's failure to pay the contractually required step increases. The Company admitted that those step increases had not been made.

On October 27, the Union filed for arbitration on the issue of the Company's failure to pay the step increases. On November 7, the Company rejected the arbitration demand. The parties next met on December 12, and again agreed to defer discussion of economic items to a later date. At a meeting held on December 16, the parties agreed to seek the aid of a mediator. Two more meet-

ings were held in January of 1987, during which the parties addressed the possible change in health insurance carriers and bereavement leave. On January 30, by prearranged agreement, the parties met separately with a mediator. The Company informed the mediator that another "new" proposal was in the offing.

At a meeting held on February 6, the Company announced "a new proposal," and a significant number of items were indeed raised for the first time. On February 24, the Union agreed to a Company proposal to switch insurance carriers. On February 26, the parties addressed a wide variety of outstanding issues, including a possible withdrawal of a request for arbitration, dental plan questions, the presence of loose asbestos on Company premises and the proper composition of the bargaining unit. The next meeting was scheduled for April 1. Before that meeting, the Company informed the Union that it had dropped seven of the new proposals it had first presented at the February 6 meeting. On April 1, the Union dropped fourteen demands and modified three others, and the parties addressed a variety of issues, resolving a few. At the end of the April 1 session, the Company appeared ready to meet the next day. The Union's lead representative said he would not be available until April 21 but expressed the Union's desire to continue the negotiations. The Company, however, announced that "given what has gone on here [we] believe we're at an impasse . . . .".

On April 2—four days before the scheduled arbitration hearing—the Company informed the Union that it would institute retroactive step increases for the employees named in the Union's demand for arbitration. The Union responded that, in addition to those employees, it sought

relief for employees not named in its original demand for arbitration but who were nonetheless affected by the Company's action. The matter proceeded to arbitration, which the Company refused to attend. The arbitrator ruled in favor of the Union and ordered the Company to make all employees whole to the extent the Company had not already done so.

The Company's alleged violations of the Act were tried before an Administrative Law Judge over four days in the fall of 1987. On May 12, 1988, she found that the Company had prematurely declared an impasse and improperly ceased paying contractually required step increases. Nine months later, the NLRB affirmed the ALJ's ruling, which it expanded to address the Company's failure to pay the required wage-step increases since October 9, 1986. The NLRB, joined by the Union as intervenor, now petitions this court for enforcement of its order, and the Company cross-petitions to vacate the Board's order.

DISCUSSION

An employer bargains in bad faith, and thus violates sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (5), if it unilaterally alters terms and conditions of employment before first reaching a true impasse in negotiations. *See, e.g., NLRB v. Katz*, 369 U.S. 736, 743 (1962). Such unilateral action "detracts from the legitimacy of the collective bargaining process by impairing the union's ability to function effectively, and by giving the impression to members that a union is powerless." *Carpenter Sprinkler Corp. v. NLRB*, 605 F. 2d 60, 64-65 (2d Cir. 1979). A genuine impasse in negotiations exists when there is " 'no realis-

tic prospect that continuation of discussion . . . would [be] fruitful.' " *NLRB v. Independent Association of Steel Fabricators*, 582 F.2d 135, 147 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979) (citation omitted). A "fundamental tenet of the [A]ct [is] that even parties who seem to be in implacable conflict may, by meeting and discussion, forge first small links and then strong bonds of agreement." *AFTRA v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968).

"[T]he issue of the existence of an impasse 'is a question of fact peculiarly suited to the Board's expertise.' " *Carpenter Sprinkler Corp.*, 605 F.2d at 65 (quoting *NLRB v. J.H. Bonck Co.*, 424 F.2d 634, 638 (5th Cir. 1970). And the Board's finding of no impasse can be overturned only if it was not supported by "substantial evidence." 29 U.S.C. §§ 160(e) and (f). While this deferential standard does not permit an abdication of judicial review, *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951), our review of the record as a whole persuades us that substantial evidence supports the Board's conclusion that no impasse existed.

We cannot fault the determinations of the ALJ and the Board that the Company prematurely declared an impasse. Although the negotiations first began in July of 1986, the Company waited five months after the Union requested negotiations before presenting it first comprehensive written contract proposal on October 1. Four months later, on February 6, the Company increased its proposed changes in the Union's requested contract from twenty to forty. Relying on those proposals, the ALJ concluded that bargaining "began anew" on those dates. We agree, and note for instance that the Company's representative repeatedly described the February

6 proposal as "new," rather than as essentially the same proposal with some revisions and modifications. However, even accepting WPIX's position that there was no "new" bargaining but only a continuation of ordinary "give and take," the fact remains that the negotiations were not static. When the Company declared an impasse on April 1, 1987, changes were being made, revisions were being offered and, as the ALJ reasonably concluded, the Union needed more time to evaluate and respond to the Company's position.

Further, as of April 1, progress was discernable. The Company admits, for instance, that on January 30 it told the mediator that it would revise a few of its proposals, and that, in a letter dated March 20, 1987, it "sent substantial modifications of the Company's February 6 proposals" to the Union, dropping no fewer than seven of its demands and modifying others. Yet at the very first meeting after making those "substantial modifications," the Company declared an impasse.

In the main, WPIX argues that, progress in other areas notwithstanding, "it is undisputed that, on April 1, the parties were further apart on each and every critical economic and flexibility issue than they were when they commenced bargaining." What WPIX ignores, however, is that significant economic issues, such as wages, were deliberately deferred at meeting after meeting. If—as the Company claims—all parties knew those key economic issues could not be resolved, one might well wonder why the parties would have bothered to discuss in the meantime what the company now dismisses as insignificant issues. The Company itself explains that the Union "for the first time [at the April 1 meeting] . . . quantified its initial proposal for a 'substantial' wage increase."

Without the premature declaration of the impasse, we cannot conclude on the record before us that progress on this proposal would have been unlikely—even if, as the Company repeatedly emphasizes, the parties' wage positions were far apart. An opening negotiating position often bears little resemblance to the conditions ultimately accepted after rounds of serious bargaining, and while the Company places great weight on the distance between the positions, no serious attempt was ever made to lessen that distance. *See Carpenter Sprinkler Corp.*, 605 F.2d at 65 (recognition by both sides that their respective positions are generally far apart is insufficient, on its own, to support declaration of impasse). We agree with the Company that there is no requirement that it devote a full meeting to the discussion of core economic issues, but where the Company relies on that very deficiency in the negotiations to justify its declaration of an impasse, it must point to at least some evidence of negotiations on that subject in the record. In addition, many mandatory subjects of bargaining, presented in the February 6 company proposal, were similarly never discussed.

The Company also urges in support of its claim of impasse that the Union dismissed certain company proposals as being "ridiculous" or a "slap in the face" to the bargaining unit. The Company, for instance, complains that Union newsletters stated that the Union would never accept certain Company proposals. What a party tells its partisans during negotiations, perhaps to rally support, may well have little bearing on the terms of employment that party ultimately accepts. Beyond that, there is no evidence in the record that WPIX was aware of the Union newsletters during the negotiations and before it declared an impasse. A review of the record leaves

little doubt that both sides engaged in some exaggeration, posturing and dilatory tactics, as might be expected in labor negotiations, and none of which is dispositive on this appeal.

In light of the foregoing, and upon review of the entire record, we conclude that the NLRB's finding of no impasse was supported by substantial evidence.

Finally, the Board's finding that WPIX violated the Act by failing to pay contractually required step increases is similarly supported by substantial evidence on the record considered as a whole. A unilateral change in an established working condition, such as a unilateral decision to stop paying contractually required step increases, violates the Act. *See, e.g., Katz,* 369 U.S. 742-43. It remains undisputed that the Company stopped paying the step increases as of September 1986. The Company instead contends that it acted in good faith, that it lacked the economic resources to make the increases, that it made the affected employees whole before the charges in this case were filed, and that its action at most constitutes a "technical" violation of the Act. *See United States Postal Service,* 253 NLRB 1203, 1206 (1981) (Penello, concurring) (violation "technical" and needs no ordered remedy where "quantum of misconduct is so slight, or its effect so substantially remedied by the wrongdoer's subsequent action"); *Bellinger Shipyards, Inc.,* 227 NLRB 620 (1976) (" 'Respondent voluntarily put itself in compliance with the Act. It is considered that such [voluntary] action should be encouraged.' ") (citation omitted).

We are not persuaded by the Company's arguments. This was not a technical violation on a peripheral issue. Rather, the step increases affected a principal item under

negotiation—the employees' wages—and remained, as the Union informed the Company as early as August of 1986, an "integral part" of the Agreement. By failing to comply with the Agreement on this score, the Company in effect held hostage the step increases to the completion of negotiations favorable to the Company. As the Company's representative explained, after the Company had suspended the step increases, "*[E]verything has a price tag* and it might be appropriate to defer those raises so that the [C]ompany would have funds to pay a raise to the rest of the members of the unit." (Emphasis added). In such circumstances the Company cannot belatedly supply "good faith" by making retroactive payments only after it prematurely declared an impasse, and even then only on the eve of an arbitration in which it refused to participate, the outcome of which appeared clear. *Cf. Truck Drivers et al. v. NLRB*, 509 F.2d 425, 427 (D.C. Cir. 1974) (timing of violator's remedial action has bearing on Board's decision). Indeed, good faith alone would not excuse a violation of the Act. *See Katz*, 369 U.S. at 742-43.

The Company has also fallen far short of establishing an economic necessity for its unilateral action—not dispositive in any event—while at the same time diminishing the effect of its action. "[R]etroactive compensation eliminated any potential 'adverse economic effect' which the denial of increases may have occasioned," the Company contends. But by framing the issue so narrowly, the Company ignores the fact that such unilateral action on so important an issue not only undoubtedly affects employee perceptions of the efficacy of the collective bargaining process, but also has a real economic effect few employees would deem "slight." We are presented

here with a deliberate violation of the Act that affected a central aspect of the collective bargaining process and denied certain employees part of the wages they were due.

CONCLUSION

For the reasons set forth above, we find substantial evidence on the record as a whole supports the Board's decision and thus grant the Board's petition for enforcement of its order and deny WPIX's cross-petition to set aside the order.

SJC

293 NLRB No. 2

D–9427
New York, NY

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

WPIX, INC.

and

Case 2–CA–22179

NEWSPAPER GUILD OF NEW YORK
LOCAL 3, THE NEWSPAPER GUILD,
AFL-CIO, CLC

DECISION AND ORDER

On May 12, 1988, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, the Union filed cross-exceptions and a supporting brief and a reply brief to the Respondent's exceptions, and the Respondent filed an answering brief to the General Counsel's and the Union's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclu-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an ad-

(Footnote continued on following page)

sions[2] and to adopt the recommended Order as modified.[3]

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[1] *continued*
ministrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the Respondent's failure to pay the wage-step increases required by the 1983-1986 contract, which the parties had extended, violated Sec. 8(a)(5) and (1) of the Act. Because we also agree with the judge's finding that the Respondent had prematurely declared impasse in its negotiations for a successor agreement when it unilaterally implemented the terms of its last offer, we find it unnecessary to pass on her further finding that the failure to pay the wage-step increases under the old contract would preclude reaching a lawful impasse in the negotiations for the successor agreement.

[2] The General Counsel and the Union contend that the Respondent lacked overall good faith and engaged in surface bargaining throughout the negotiations. We disagree. The record clearly shows that the Respondent was willing to meet and confer with the Union, exchange proposals, and modify its positions in an attempt to reach agreement with the Union. See, e.g., *G. Zaffino & Sons*, 275 NLRB 456 (1985); *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985), enfd. 789 F.2d 121, 136 (2d Cir. 1986).

The General Counsel and the Union also argue, inter alia, that the Respondent's proposal to conduct arbitration under the Federal Mediation and Conciliation Service (FMCS) in lieu of the American Arbitration Association (AAA) was in retaliation for the Union's wage-step grievance. Even assuming that this matter was fully litigated at the hearing, the General Counsel has failed to prove an 8(a)(5) violation. The Respondent explained, without contradiction, that it made the proposal because the AAA had mandated the selection of an arbitrator previously rejected by the Respondent to conduct the wage-step arbitration. The Respondent also maintained that the services of the FMCS are less costly than those offered by the AAA. Accordingly, we conclude that the Respondent did not make the proposal in bad faith.

[3] We shall issue amended conclusions of law, a modified Order, and a new notice to employees that more closely conform to the violations found.

Amended Conclusions of Law

1. Substitute the following for Conclusion of Law 3.

"3. By unilaterally failing to pay contractually required wage-step increases since October 9, 1986, the Respondent refused to bargain in violation of Section 8(a)(5) and (1) of the Act."

2. Insert the following as Conclusion of Law 4 and renumber the subsequent conclusion of law.

"4. By unilaterally implementing changes in terms and conditions of employment from April 1, 1987, at which time no bargaining impasse existed, the Respondent refused to bargain in violation of Section 8(a)(5) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, WPIX, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following paragraph 1(a) and reletter the subsequent paragraphs.

"(a) Refusing to bargain in good faith with the Union by unilaterally failing to pay contractually required wage-step increases since October 9, 1986."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. February 28, 1989

James M. Stephens, Chairman

Wilford W. Johansen, Member

Mary Miller Cracraft, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Newspaper Guild of New York Local 3, The Newspaper Guild, AFL-CIO, CLC by unilaterally failing to pay contractually required wage-step increases.

WE WILL NOT refuse to bargain with the Union by unilaterally changing wage rates and other terms and conditions of employment in the absence of bargaining impasse. The bargaining unit is:

INCLUDED: News editors, assignment editors, senior writers, news writers, sports specialist, senior assignment desk assistants, talent coordinators, graphic artists, assignment desk assistants, graphics assistants, production assistants and telephone clerks in the news department of WPIX-TV.

EXCLUDED: All other employees in the News Department of WPIX-TV, including News Director, Executive Producer, Managing Editor, Producers, Metropolitan Editor, Graphics Director, Business Manager, administrative assistant (confidential secretary), all

employees represented by other labor organizations, guards, watchmen and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole all bargaining unit employees for any losses they may have suffered as a result of our unlawful unilateral changes in the terms and conditions of employment, with interest.

WE WILL, on request from the Union, revoke any unilateral changes in terms and conditions of employment and reinstate the terms and conditions that existed before our unlawful changes, although this does not mean that we must rescind any wage or benefit increase granted to unit employees.

WE WILL, on request, bargain collectively with the Union with respect to rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WPIX, INC.

(Employer)

Dated ---------- By ----------

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 26 Federal Plaza, New York, New York 10278-0104, Telephone 212-264-0360.

JD(NY)–32–88

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

WPIX, INC.

and Case No. 2–CA–22179

NEWSPAPER GUILD OF NEW YORK
LOCAL 3, THE NEWSPAPER GUILD,
AFL-CIO, CLC

ERRATUM

On 12 May 1988, the undersigned issued a Decision and Recommended Order in the above-captioned case. Conclusion of Law No. 4 found that "Respondent did not engage in unfair labor practices other than those found herein."

In the preparation of the Recommended Order, the following was inadvertently omitted and it is hereby added after line 21 page 16:

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleged violations of the Act not specifically found herein.

Dated: Washington, D.C. May 24, 1988

/s/ ELEANOR MACDONALD
Eleanor MacDonald
Administrative Law Judge

JD(NY)–32–88
New York, NY

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

WPIX, INC.

and Case 2–CA–22179

NEWSPAPER GUILD OF NEW YORK
LOCAL 3, THE NEWSPAPER GUILD,
AFL-CIO, CLC

James Wasserman, Esq., for the
General Counsel
Richard L. Marcus, Esq. and
Susan M. Benton-Powers, Esq.
(Isham, Lincoln & Beale), of
Chicago, IL for Respondent.
Louis Pechman, Esq. (Vladeck,
Waldman, Elias & Engelhardt),
of New York, NY for the Charging
Party.

DECISION

Statement of the Case

ELEANOR MACDONALD, Administrative Law Judge: This case was tried in New York, New York on 20, 21 and 22 October and 12 November 1987. The complaint alleges that Respondent, in violation of Sections 8(a)(1) and (5) and 8 (d) of the Act, failed to grant employees step increases due under the collective bargaining agreement,

offered inconsistent and contradictory written proposals, threatened to repudiate an agreement unless the Union withdrew a pending grievance, refused to bargain about employee evaluation criteria, declared a premature and invalid impasse and unilaterally changed numerous terms and conditions of employment. Respondent denies that it failed to bargain in good faith, alleges that the Union delayed the negotiations and engaged in surface bargaining and alleges that the parties had negotiated to impasse by 1 April 1987. In addition, Respondent raises the statute of limitations as a bar to the allegations regarding certain of the step increases.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by General Counsel and Respondent, I make the following:[1]

Findings of Fact

I. Jurisdiction

Respondent, a New York corporation with an office at 11 WPIX Plaza in New York, New York, operates radio and television broadcasting stations. Respondent annually derives gross revenues in excess of $100,000, advertises products sold nationally and subscribes to national wire services. The parties agree and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that Newspaper Guild of New York Local 3, The Newspaper Guild,

[1] After the initial exchange of briefs in January, 1988, both General Counsel and Respondent filed additional letters. I have considered these in reaching my decision.

AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Negotiations Generally*

The Union represents the following unit of employees of Respondent:

> INCLUDED: News editors, assignment editors, senior writers, news writers, sports specialist, senior assignment desk assistants, talent coordinators, graphic artists, assignment desk assistants, graphics assistants, production assistants and telephone clerks in the news department of WPIX-TV.
>
> EXCLUDED: All other employees in the News Department of WPIX-TV, including News Director, Executive Producer, Managing Editor, Producers, Metropolitan Editor, Graphics Director, Business Manager, administrative assistant (confidential secretary), all employees represented by other labor organizations, guards, watchmen and supervisors as defined in the Act.

Respondent and the Union have been parties to a series of three-year contracts. At the time relevant to the instant case, WPIX and the Union were negotiating a successor agreement to the one with a term from 25 June 1983 to 24 June 1986.

There were 12 negotiating sessions from 1 July 1986 through 1 April 1987, when WPIX declared that an impasse existed and unilaterally implemented its last offer.

B. *Summary of the Negotiating Sessions*

For the first four negotiating sessions, WPIX was represented by Andrew L. Hughes, Esq., who had represented

it in prior negotiations. General Counsel does not allege "that Hughes acted in bad faith either at or away from the bargaining table.[2]

On 21 May 1986, the Union had submitted its proposals for the new contract. The demands included changes relating to union security, grievance and arbitration procedure, probationary period, recall list, posting of schedules, paid holidays, and leaves of absence. The Union said it wanted to negotiate a "substantial" wage increase, but no amounts were specified. The Union sought to eliminate the factor of ability to perform the work from the layoff and recall provisions of the contract, it sought greater job security in the face of technological advances, it sought improvements in severance pay and it sought to reduce the work week and improve overtime, missed meal compensation, vacations, and sick leave provisions.

The first negotiating session took place on 1 July 1986. The Union expressed concern that after recent layoffs, interns might be performing unit work. The Union had previously sent its written proposal which Hughes was "not thrilled about." The Company had no written proposal. Hughes said the Company was subject to a "severe financial crunch" and could not add to the contract. Hughes mentioned that he was concerned about large severance pay amounts already due and the fact that employees were "banking" their vacations from year to year.

The second negotiating session took place on 22 July 1986. There was additional discussion of the use of interns.

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[2] Hughes was accompanied by Senior Vice President John Corporon and other employees of WPIX. The Union was represented by business representative William Montes, unit chairperson William O'Meara and other unit employees. On some occasions, James Madden, Esq., a business agent was present with the Union team.

Hughes said he wanted to take seniority out of the contract and put a cap on severance pay. Hughes complained about the cost of the overtime payment for missed lunch periods. No written Company proposal was presented.

The third negotiating session took place on 8 August 1986. The Company had no written proposal and Hughes explained that he had to figure out a way to sell givebacks to the Union. He said the Company could afford very little and that it needed improvements but that it was not seeking "wage cuts." Perhaps more layoffs would be needed to fund the next wage increase. Hughes mentioned a selective wage freeze and the Union said that would present a problem. Hughes said the Company wanted to eliminate the step increase method of granting wage increases and Montes said it was an "integral part" of the contract and that he opposed the suggestion. The Company suggested either a new dental plan or a higher deductible to hold down costs of the plan. The Union asked to see a written proposal concerning the dental plan. Hughes discussed the Union's demand for two weeks' notice of scheduling and stated that it did not give the Company enough flexibility.

The fourth negotiating session took place on 13 August 1986. Hughes said he had no "good news." The Company had new cost cutting edicts. O'Meara testified that Hughes said a time might come when the company would come to the Union "with a more limited set of conditions that [the Union] would have a limited time to accept otherwise it would be imposed unilaterally." I credit O'Meara's testimony. Hughes said the parties were bargaining to impasse. Montes replied, not yet but that the parties were approaching the point of no return. He said the parties had not even begun negotiating. Hughes handed out a written proposal on behalf of WPIX. Hughes testified that

on 13 August 1987 he did not have a complete wage proposal despite his earlier promise to have one for that meeting. Hughes had been told that the aim of WPIX was to eliminate inefficiencies and cut costs. The Union proposals would have increased costs. Hughes testified that he did not discuss wages with the Union because the subject was "deferred." The Company also gave the Union information about the new dental plan. After confirming that no other changes would be made, the Union accepted the new dental plan.[3]

The next meeting had been scheduled for mid-September. In the event, the parties did not meet until October 1986.

Beginning 1 October 1986, the Chief Union spokesman was Sidney Kress, Esq., staff attorney and business agent. WPIX's chief spokesman, Hughes, had been replaced by Richard L. Marcus, Esq. The Union presented modifications to its proposal of May, 1986. The Company presented a complete written proposal which it explained was a new proposal to replace the document prepared by Hughes in August. The Company proposals contained 20 numbered items.

On 1 October 1986, WPIX proposed that employees would no longer be paid for skipped meals. Employees consistently worked a 40 hour week and did not take the meal period allotted every working day. Instead, they were paid ½ hour overtime for every working day, of 2½ hours per week. The evidence shows that this procedure

[3] The new dental plan insurance carrier was Aetna. Under the new plan, effective 1 October 1986, the deductible was increased and a change was made to increase preventive coverage. The plan provided for two free teeth cleanings with a dentist to be chosen by the individual employees.

added a substantial sum to the employees' weekly paychecks, estimated by Marcus to average 6% of wages for the unit employees.

Kress questioned a memorandum issued by WPIX to unit members which abolished the system of free dental cleanings with Drs. Frankel and Marx as of 1 October 1986.[4]

Kress told Marcus that the Company had failed to grant step wage increases under the contract.[5] According to O'Meara, Marcus replied that the step increases were not being paid and that "everything has a price tag and it might be appropriate to defer those raises so the Company would have funds to pay a raise to the rest of the members in the unit." The Union responded that it was filing a grievance over the failure to grant the increases, and the Company agreed to waive a formal grievance session. The Union stated that it would file for arbitration.

The WPIX proposals of 1 October 1986 contained a pay schedule different from that in effect, and conditioned movement after one or two steps upon management's judgment of merit. Those not at the top of the scale would receive up to a 2% wage increase. In the Union's view, the 2% wage increase for some employees taken together with the Company's proposal to eliminate the skipped

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[4] This system had provided each unit employee with two free cleanings per year with Drs. Frankel and Marx. WPIX eliminated the system because the new Aetna dental coverage, effective on 1 October, provided two free cleanings with the employees' own dentists.

[5] It is undisputed that the 1983-1986 contract remained in effect during the negotiations. The step increases were based on an employee's length of service in his or her job title.

meal payment would effectuate a substantial wage decrease for unit employees.

A meeting was scheduled for November, but it was cancelled due to the illness of Kress and his subsequent departure from the Guild.

The next bargaining session took place on 12 December 1986. Kress was replaced as chief union spokesman by Leo Ducharme, international representative. The parties went through the Company proposals in detail. After they did so, Ducharme said that the proposals were damaging to unit members' morale. Marcus replied that the Company did not wish to destroy morale, but Ducharme said the Company would not be able to convince the Union of its need for the proposals. Ducharme asked if the Company would agree to any of the Union demands. The parties indicated which items were high priority and which were less important. The parties discussed the Company proposal to eliminate the paramount use of seniority in determining order of layoff.[6] Ducharme indicated that the parties were at "opposite poles" but that there was a "middle ground." Marcus said he would discuss the proposal with the Company. The Union offered to drop its grievance procedure proposal if the Company also dropped its proposal. Marcus refused this offer.

The parties next met on 16 December. At the Union's suggestion they discussed a number of grievances including the elimination of the free dental cleanings. They agreed to contact a federal mediator.

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[6] As of 12 December, the Union's proposal on layoffs removed all reference to skill and ability and relied on seniority.

The parties next met on 13 January 1987. They discussed various proposals including bereavement leave and paternity leave. The company mentioned that it was possible to change the carrier for the medical insurance plan and the Union agreed to meet with representatives of Aetna, the proposed new carrier, on 20 January. O'Meara testified that at Marcus' instance, proposals and demands that were economic in nature were deferred from discussion and were agreed to be "part of the final package."

On 20 January, the Union representatives met with Aetna in the morning. The meeting ended with a promise from Aetna to prepare a new proposal for coverage.

The parties met in the afternoon of 20 January for contract negotiations. The inconclusive nature of the current Aetna proposal was discussed. The parties discussed a new written bereavement policy. The Union narrowed its demand. Marcus had been trying to contact the mediator, and he reported that he had finally been successful and that the mediator was available on 30 January 1987.

On 30 January 1987, the parties each met separately with the federal mediator.

The parties next met on 6 February 1987. Marcus announced that as a result of the negotiations so far and his discussions of his proposals with the Company, he was presenting a new proposal. The document contained 40 numbered items. Marcus then went through the new proposal point by point and explained any questions the Union posed about the proposal. Some of the proposals were revisions of earlier proposals. According to Marcus, a number of the proposals were entirely new and were based on information Marcus had obtained in preparing for negotiations with other units of WPIX unit employees.

The arbitration provisions were to be changed substantially so as to establish a new appointing agency and to remove decisions as to procedural and substantive arbitrability from the jurisdiction of the arbitrator.[7] Consideration of seniority was entirely removed from the clause relating to reduction in force and recall from layoff. Marcus proposed deleting the clause that stated the Company's and the Union's recognition that technological change could cause loss of jobs and the Company's continued efforts to consider employees displaced by technological change for other positions. Marcus proposed changing the practice whereby severance pay was granted upon layoff; the new proposal would make it payable only upon expiration of the recall period. The new proposals would remove the preference for unit employees in the filling of vacancies and would give management the right to demote employees even after completion of the probationary period established in the old contract. Other changes in-

[7] Senior Vice President Corporon testified that since 1972, arbitrations between the parties had been conducted under the auspices of the American Arbitration Association (AAA). The Company had not proposed any change in the contractual arbitration procedure. However, by 6 February 1987, the Union had requested arbitration of its grievance over the Company's failure to grant the contractually mandated step up pay increases. Marcus objected to arbitration on the ground that the Union was not bargaining fast enough and he objected to continuation of the contract provisions which WPIX sought to eliminate through negotiations. The AAA ordered the arbitration to proceed over Marcus' objections and the hearing was scheduled for 6 April 1987. On 2 April, Marcus advised the Union that WPIX would retroactively pay the step up increases due under the contract. He did not appear at the arbitration hearing held on 6 April. The arbitrator upheld the grievance. Marcus' 6 February proposal replacing the AAA with the Federal Mediation and Conciliation service and removing all questions of arbitrability from the jurisdiction of the arbitrator would have the effect of forcing the Union into court litigation if the company objected to arbitrating a grievance under the new contract.

volved payment of overtime, doubletime, posting of schedules in a timely fashion, holiday pay and entitlement to vacations. WPIX had previously proposed a change in the banking of vacation time so that it would be paid at the rate earned: Now, Marcus proposed eliminating the possibility of banking vacation time altogether unless the Company requested an employee to defer a vacation. The Company proposals would permit it to make more extensive use of temporary employees. WPIX proposed to delete news editors from the unit. On 6 February 1987, Marcus for the first time proposed a 3 year contract. Before that date, the Company had sought a 2 year contract.

Marcus recalled that after he presented the new set of proposals to the Union, Ducharme expressed the opinion that the Company was trying to avoid reaching a collective bargaining agreement.

The parties agreed effective 1 March 1987, to change the medical insurance coverage to Aetna as proposed by WPIX. The parties agreed on an interim basis to maintain a level of employee and employer contribution to the cost until a new contract was reached between them.

The Union had recently requested arbitration of the issue raised by the Company's abolition of the free cleanings with Drs. Frankel and Marx. WPIX took the position that the new dental coverage with Aetna was a replacement for the Frankel-Marx benefit.

The parties next met on 26 February 1987. On that day, they discussed the presence of asbestos in the workplace in an area under construction and what safeguards would be taken to protect employees.

The parties discussed the Company's proposal of 6 February 1987 to remove the news editor from the bargaining unit. The Company rationale was that the position

should be in management because under its proposed new system of merit increases, the news editor would evaluate employees' performance. The Union asked what criteria would be used in evaluating performance for merit increases. WPIX replied that the criteria had not been developed and that this would be done by management after the Union agreed to the proposal. The Union said it would not accept the proposal. The Union believed the merit system of increases based on employer's criteria is unjust. However, the Union has two contracts in which such merit increases are provided.

Marcus testified that Ducharme asked him about the merit review and "what's going to be involved?" He replied that WPIX "had not formulated any specific system for doing that as of this time. . . ." According to Marcus, this was the only time the Union raised the question of merit reviews.

At the end of the meeting, Marcus said he could not set up another date but that after consulting with management he would get back to the Union. The parties subsequently agreed to meet on 1 April 1987. Marcus testified that he told the Union no progress had been made and that he had to confer with Corporon who was not then present, before he could set another date.

On 20 March, Marcus sent a letter to Ducharme deleting 7 of the Company's proposals and modifying the severance pay and vacation pay proposals. WPIX abandoned its attempt to remove news editors from the unit and to delete from the agreement the provision for employees dislocated by technological change and the provision relating to schedule posting. The Company dropped its proposal permitting demotions after the probationary period. WPIX also revised its proposal relating to interns. In his letter

of 20 March, Marcus expressed a sense of urgency about the negotiations and the hope that they could be concluded as quickly as possible.

The parties met on 1 April 1987. They discussed the issue of performance of unit work by nonunit employees. The Union questioned the meaning and intent of the language proposed by the company and said it could accept a provision within stated limits. No agreement was reached on this topic. At the 1 April meeting, the Union dropped a number of demands relating to coverage of the contract, union security, job security, severance pay, probationary periods and overtime. The Union proposed a wage increase of 8% per year. The Union modified its demand relating to vacation, sick leave and paternity leave. The Union discussed the Company proposal to require grievances to be filed within 30 days. It proposed 90 days; no agreement was reached on this issue, but some language on grievances was worked out. Thus, Marcus accepted the Union proposal that the time for filing a grievance would start to run when the employee knew or should have known of the grievance. The Union accepted the Company's proposal to add language prohibiting the arbitrator from adding to, ignoring or modifying the provisions of the agreement. The Union still refused to accept a change in the agency appointing the arbitrator.

Ducharme asked if the Company had any position on the Union modifications. Marcus replied that they could not accept any of them under any circumstances.

At about 4:15pm, the Union representatives said they had to leave and they asked to set up the next meeting. Marcus said he was available the next day, but Ducharme could not meet until 21 April. At that point Marcus said the company believed the negotiations were at impasse,

and that WPIX was terminating the contract and implementing its proposal. Ducharme responded that the Union position was that there was no impasse and that the Union "was ready to continue discussing the proposals and to move on our proposals." Ducharme told Marcus that the Union had expected the Company to declare impasse based on its 20 March 1987 letter. But Ducharme reiterated that he was willing to negotiate and to make additional modifications. Marcus replied that if the Union had something else to propose it should write him a letter. Then Marcus left. Corporon held a meeting in the newsroom with unit employees about an hour later to inform the employees that an impasse had been declared and the Respondent's proposals implemented.

Marcus testified that elimination of the missed meal payment to unit employees would amount to about a 6% pay cut per annum. The company was proposing a 2% pay increase (but without taking into account the defacto 6% decrease in the other part of its proposal). When on 1 April 1987 the Union proposed an 8% wage increase, Marcus did not view this as a basis for negotiations. He stated that the Company "proposal was not made as a means of seeking middle ground. It was a proposal made to try and reduce the costs that the Company was bearing."[8]

According to O'Meara, the parties to the negotiations had mutually agreed that discussion of "economic" items would be deferred until a final discussion of all economic matters could resolve the cost of the overall agreement. O'Meara recalled that Marcus introduced the concept that all matters of financial impact would be deferred until a later stage of the negotiations.

[8] Marcus stated that at no point in the negotiations from 1 October 1986 through 1 April 1987 did he consider accepting a union demand as a trade off for a Company proposal.

C. *Specific Violations Alleged in the Complaint*

1. *Failure to Grant Step Up Increases*

It is undisputed that the 1983-1986 contract between the parties remained in effect during the negotiations. Article XVII of the contract provided minimum wages for each job title classification of the unit employees and provided for so-called step up increases after specified time periods such as 6 months, 1 year, 2 years or more. On 1 October 1986, the Union informed Company negotiators that the step increases were not being granted as required by the contract. Marcus acknowledged that the increases were not being paid. The Union announced that it was filing a grievance over the failure to grant step wage increases, the Company agreed to waive the formal grievance session, and the Union stated that it would file for arbitration. The Company resisted arbitration on the ground that the Union should not have been seeking to enforce the wage provisions of the contract while the Company wanted to modify those provisions through collective bargaining. The American Arbitration Association scheduled the matter for an arbitration hearing to be held on 3 April 1987. On 2 April 1987, the Company advised the Union that it had "decided to institute retroactive wage adjustments" for certain employees. The arbitration hearing was held without the appearance of the Company, and by award dated 13 May 1987, the arbitrator upheld the grievance and ordered WPIX to make the employees whole. At the trial herein, the parties stipulated that the employees named in the instant complaint, as amended by General Counsel, had received retroactive wage increases "shortly" after 2 April 1987.

The conclusion is inescapable that each individual failure to pay the wage required by the contract, including the mandated step up increases, is unlawful and in violation

of Section 8(a)(1) and (5) of the Act. *Abbey Medical/Abbey Rents, Inc.*, 264 NLRB 969, 975 (1982). The defense based on the statute of limitations is without merit as to each failure to pay the proper wage from 9 October 1986, a date 6 months before the filing of the instant charge. Further, Respondent's contention that the violation is "technical" and does not warrant a remedial order is not supported by the cases cited in Respondent's brief. *Bellinger Shipyards, Inc.*, 227 NLRB 620 (1976); *Deringer Company*, 201 NLRB 622 (1973). In those cases, the Board found that the unlawful conduct was "minimal" and that "there was no showing that the employees were adversely affected." In the instant case, employees were denied wages due to them under the contract, an adverse economic effect which no employee views as minimal.

2. *Threat to Repudiate an Agreement*

General Counsel asserts that the Company threatened to repudiate the agreement reached about new medical and dental insurance unless the Union withdrew a pending grievance relating to the two annual free dental cleanings provided by Drs. Frankel and Marx. The testimony of all the witnesses shows that for some time the Company paid for the free cleanings and that under the new dental insurance plan agreed to by the parties effective 1 October 1986 two free cleanings were provided for by the dentist of the employee's choice.[9] The issue centers

[9] The changes in health insurance were made in two stages. In August 1986, the parties agreed on a change in dental coverage effective 1 October 1986. Beginning in January, 1987, the parties discussed other aspects of medical insurance. A final agreement on all dental and medical coverage was reached effective 1 March 1987.

on the discontinuance of the Drs. Frankel and Marx cleanings in October, 1986, and the Union's filing of a grievance over the loss of the benefit. On 26 February 1987, O'Meara understood Marcus to say that unless the Union withdrew its pending grievance, the Company would withdraw from the agreement to participate in the new Aetna dental and medical insurance plan, which was to be effective on 1 March 1987. Marcus testified that he told the Union that the new plan provided for free dental cleanings, and he wished the agreement about medical and dental insurance to resolve all open issues prospectively from 1 March 1987. Marcus testified that at no point did he press the Union to withdraw the grievance in return for continued Company adherence to the agreement for new dental and medical insurance. In fact, the arbitration was held in July, 1987, and the grievance was denied. I find that O'Meara misunderstood Marcus' comments at the bargaining table. I find that Marcus did not threaten to withdraw from the insurance agreement unless the Union dropped its grievance. Instead, I find that Marcus said the Company would not proceed with the insurance plan unless it resolved all issues from the date of 1 March 1987. Thus, I do not find that Respondent violated the Act.

3. *Inconsistent and Contradictory Proposals and Refusal to Discuss Evaluation Criteria*

General Counsel cites as examples of inconsistent proposals made by the Company the following: Hughes stated he was not asking for a wage reduction but Marcus later proposed such a reduction; Hughes had apparently worked on a proposal which retained a system of step up increases while Marcus' proposal eliminated the step increases and gave a 2% or lower across the Board increase to employees, depending on their current rate.

The testimony shows that Hughes had announced that he was under instructions to cut costs, that he had to find a way to sell give backs to the Union and that he wanted to eliminate the missed meal payments to employees. Hughes did not say he would ask for a wage cut, but he did mention the possibility of a freeze or future layoffs to cut costs. Hughes never actually made a wage proposal to the Union. Marcus did make a wage proposal entailing a 2% or lower wage increase, which when coupled with the loss of missed meal payments, would have meant a net wage loss to the employees. Further, although internal Company documents suggest Hughes worked on a proposal to keep the step increases, he never presented it, nor any other wage scale, to the Union.

Based on these facts, I cannot find any inconsistency. Both Hughes and Marcus gave fair notice that the Company wished to cut costs and that draconian measures would be proposed to the Union. Both targeted specifically the missed meal payments which amounted to at least 6% of employee wages. Although Marcus' proposal to eliminate the step increases angered the Union, it was not inconsistent with Hughes' proposals since Hughes had not given the Union a wage proposal.

Another example of an inconsistent Company proposal cited by General Counsel is the exchange of 1 April 1987 concerning performance of unit work.

In its proposal of 1 October 1986, as modified on 6 February 1987, the Company had proposed language permitting non-bargaining unit employees occasionally to perform bargaining unit work. In response to Ducharme's question on 1 April about the meaning and implementation of the language, Marcus replied that it would permit Corporon or his secretary to answer the telephone in the newsroom

or book a guest for the show. O'Meara testified that he stated that this interpretation was in accord with current practice. Ducharme said the Union could accept the proposal providing it would not change present practice. Marcus replied that the examples he had just given were not exhaustive and that the clause might be applied differently. The Union then stated that it would not accept the proposal.

General counsel argues that Marcus' actions amount to "a sudden shift to increased demands that were inconsistent with [Marcus'] prior explanation" in order to avoid reaching an agreement with the Union. I do not find that the facts are consistent with General Counsel's theory. In this case, Marcus and the Union engaged in a brief exchange about the meaning of a Company proposal. In response to the Union's statement that if the meaning were limited it would accept the proposal, Marcus hastened to explain that the language could be read in a more expansive way. This is not a situation where the Company had been adamantly insisting on a provision and had explained it at length only to change its proposal once the Union seemed willing to agree. Cf. *NLRB* v *Herman Sausage Co.*, 275 F.2d 229, 233 (5th Cir. 1960). Instead, Marcus' explanation of his initial explanation came during the exchange concerning the meaning and intent of the proposed language. It would hardly serve the cause of collective bargaining to limit a party's permissible explanation of its proposals to one or two sentences; the give and take of negotiations requires the ability to explore a proposal at length.

General Counsel supports the allegation that WPIX refused to discuss the evaluation criteria to be employed by the Company under the wage proposal by the following: On 1 October 1986, Marcus proposed that future

movement to the top wage rates for a job title classification would be "at the Company's discretion." This was part of the proposal to eliminate the automatic step increases and substitute merit evaluations. On 6 February 1987, Marcus also proposed elimination of the news editor from the bargaining unit since that employee would henceforth be involved in conducting the merit evaluation for unit employees.

On 26 February, when the Union asked what criteria would be used in merit evaluations, Marcus replied that these had not yet been formulated. He said the criteria would be formulated by the Company after the Union accepted the proposal to remove the news editor from the unit. Even after Marcus deleted the proposal to drop news editors from the unit on 20 March 1987, he still proposed that raises to the top wage rates would be determined by the Company, but he still did not provide any criteria for the Company's exercise of its "discretion."

General Counsel urges that by proposing raises at the Company's unilateral discretion without discussing the applicable criteria, WPIX removed the highly significant subject of wages from the bargaining table.

The evidence shows that on 26 February 1987, the Union asked what the criteria for wage increases would be under the Company's proposal, and Marcus said these had not yet been developed. I can find no indication that the Union asked about the criteria again. Marcus' statement that the Company would develop the criteria was thus the last word on the subject before he declared impasse on 1 April 1987.

I do not find that the Union ever requested WPIX to bargain about the criteria for granting pay raises, thus I do not find that Respondent refused to bargain on this issue.

4. *Declaration of Impasse and Unilateral Changes*

The conclusion seems clear that there was no true impasse between the parties on 1 April 1987 when the Company declared impasse.

The parties began negotiations in July, 1986. After four meetings, during which no wage proposal was submitted by the Company, a new Company bargaining representative came on the scene with a new set of proposals to replace the incomplete Company proposals presented earlier. Thus, on 1 October 1986, the bargaining in essence began anew. The parties met six times from 1 October 1986 to 30 January 1987. During these sessions the Company presented its new proposals on 1 October. On 12 December, the parties discussed the Company proposal in detail and the Union offered to compromise on the grievance procedure and sought a middle ground on the seniority issue. On 16 December, the parties discussed pending grievances. On 13 January bargaining took place on certain leave issues. On 20 January the parties dealt with medical insurance and the Union narrowed its demand on bereavement leave. On 30 January the mediator was brought in and met with the parties separately. Nothing in this brief summary indicates that there was a failure of the bargaining process. Instead, there was exploration of the parties' aims and proposals, offers of compromise by the Union and a resort to the assistance of a mediator.

Then on 6 February 1987, the Company presented a new set of proposals containing 40 items. Some of these were changes to the 20 proposals presented by Marcus on 10 October 1986, but many of these were new demands. For the most part, the new proposals did not represent an attempt to compromise with the Union by taking into account Union concerns or demands. Many of the

proposals of 6 February were unfavorable to the Union and involved more retrogression in employee rights under the contract than did the proposals of 1 October 1987. Indeed, Marcus candidly testified that he prepared the WPIX proposals of 6 February based on new information he had acquired concerning the Company's needs. In a sense, the bargaining again began anew on 6 February. The Union had new demands and new language to consider.

The parties met 3 times to consider the 6 February proposals. On 6 February the new proposals were given to the Union and were discussed. On 26 February, the parties met; they discussed removal of the news editor from the unit, criteria for merit increases and an asbestos problem. The new medical insurance plan was finally agreed to. By letter of 20 March, WPIX dropped some of its proposals and moved close to the Union position on others. On 1 April, the Union dropped some of its proposals and modified others; it also proposed some compromise on the subject of grievances. Thus, some progress was indeed made by the parties in bringing their positions closer together; each side dropped demands deemed unfavorable by the other. This movement indicates that bargaining was not exhausted and that it would not have been futile to continue collective bargaining negotiations. The Union wanted to negotiate further. The fact that the parties were not close on many issues does not indicate that the negotiations were deadlocked; it shows that the parties still had many hours of bargaining before them in order to resolve their differences. The parties had met only 3 times since the new proposals of 6 February 1987. By the nature of the issues still to be resolved, it was to be expected that the negotiations would be lengthy and difficult. Moreover, the evidence shows that parties had

never bargained extensively about wages. WPIX had proposed to change the automatic step increase system to a merit system based on employer evaluations. The Union had expressed its opposition to this new system. In addition, the employer's 2% wage increase offer was too low, in the view of the Union. But no extended discussion of wages had ever taken place. The uncontradicted testimony shows that wage discussions had been deferred by mutual agreement. In fact, it was not until 1 April 1987 that the Union asked for an 8% annual increase. Even on 1 April, no bargaining took place on economic items. Thus, it is clear that no impasse could have been reached on the subject of wages. And without an intensive discussion of wages, it would be difficult to find that any bargaining impasse had been reached. Although, as Respondent points out, the Union was opposed to a system of merit increases, it did have such provisions in other of its contracts. Further, there is no evidence that the Union had refused to discuss the Company's proposal for such a system.

Although Respondent's brief faults the Union for not having accepted Company proposals during the course of bargaining, it is clear that the Union could not be required to compromise its own demands where the employer felt free to keep adding new proposals to the table. The Union would then be withdrawing or modifying its demands only to be faced with the later addition of more Company proposals. In such an instance, the give and take of collective bargaining would be meaningless because it would involve no mutual give and take; only the Union would be giving. And the Union would have no way of gauging what the Company's basic needs were in order to offer a compromise in these areas because, faced with an incomplete and ever-changing set of demands, the Union could never be sure what Company proposals were of paramount importance in reaching a contract.

At the end of the 1 April bargaining session, the parties discussed when to negotiate further. Marcus wanted to meet the next day, but when it was clear that Ducharme could not meet until 21 April, Marcus declared impasse and said WPIX would implement its last offer. Apparently Marcus was willing to negotiate further with the Union but unwilling to wait 3 weeks to do so, and for that reason he declared an impasse. This was in the face of Ducharme's statement that the Union was prepared to meet and to "move" on its demands. Respondent's brief intimates that the Union was not willing to meet as often as the Company wished and that this unwillingness was the cause of an impasse being reached. It is true that the negotiations were protracted. Some delays in meeting were due to the fact that both the Company and the Respondent changed their chief spokesmen in the negotiations. One delay was due to a Union's spokesman's illness. Some delay was caused by the unavailability of the mediator. It would be useless and wasteful to recite all the facts in detail. The Union has not been charged with refusing to bargain in the instant case. The Union did not refuse to meet with WPIX and it did not refuse to schedule new dates for negotiations nor did it abruptly cancel meetings with no apparent justification. Marcus was piqued that on 1 April Ducharme stated that his next available date was 21 April. A delay of 3 weeks is not unreasonable. See *Gulf States Manufacturers, Inc.*, 287 NLRB No. 4, sl op pp. 19-20 (1987).

I conclude that no impasse existed in the collective bargaining negotiations between Respondent and the Union when Respondent declared impasse on 1 April 1987. See *Powell Electrical Mfg.*, 287 NLRB No. 100 (1987), ("The parties had yet to bargain exhaustively over core economic issues. The relatively limited discussions engaged

in do not provide a basis for Respondent's alleged belief that further bargaining would have been futile."); *Towne Plaza Hotel*, 258 NLRB 69, 78 (1981), (recent union concession and expression of willingness by union to consider employer's proposals show no impasse existed); *Henry Miller Spring & Manufacturing Co. Inc.*, 273 NLRB 472 (1984), (no impasse based on continuous negotiations involving concessions and agreements and a final lengthy session during which some items were settled); *SGS Control Services, Inc.*, 275 NLRB 989 (1985), (recent concessions and statement that differences could be worked out show no impasse was reached).

In addition to my conclusion that the parties had not bargained to impasse on 1 April 1987, I note that I have found above that beginning 1 October 1986, and continuing until after 1 April 1987, the Company admittedly was not paying required wage step up increases to employees. This unilateral change was an unfair labor practice and an absence of good faith by WPIX, and thus no lawful impasse could be reached while it persisted. *NLRB* v *Katz*, 369 U.S. 736, 747 (1962). Respondent, citing *Eagle Express Co.*, 273 NLRB 501 (1984), argues that its failure to abide by the contract did not contribute to a deadlock between the parties. Respondent seems to argue that the Union did not care about the failure to pay step up increases. I note that the Union pressed its claim to the increases immediately and fully: it asked Marcus about them on 1 October 1986, and then it secured the Company's waiver of the intermediate grievance step and filed for arbitration. *Eagle Express* is not applicable to the case at bar. In *Eagle Express*, the ALJ found that an almost bankrupt employer which reduced wages unilaterally in the face of the Union's technique of discussing the wage issue interminably rather than engaging in negotiations de-

signed to reach agreement was privileged later to declare impasse despite the earlier unlawful unilateral action. In adopting the judge's finding in *Eagle Express*, the Board panel noted that the unilaterally reduced wages were discussed in the negotiations between the parties. In the instant case, Respondent unilaterally failed to pay the step increases before it presented its wage proposal to the Union and Respondent did not engage in extensive bargaining on its wage proposal or other economic items: these were deferred by mutual consent to some later stage of the negotiations. No finding can here be made that the Union's dilatory tactics prevented the parties from reaching agreement on wages. In *Eagle Express*, the Board distinguished *Bedford Farmers Cooperative*, 259 NLRB 1226 (1982), where the unilateral action was taken before bargaining began and where additional unilateral action was taken contrary to a tentatively settled matter. In the instant case, Respondent did not take emergency action in the face of an intransigent Union. Here, Respondent took action without prior negotiation and without subsequent discussion of the subject. The Union was faced with a *fait accompli*, and the Company did not permit the bargaining to go on long enough for an impasse on wages to take place.

Thus I find that the unilateral changes put into effect on 1 April 1987 were unlawful and in violation of Sections 8(a)(1) and (5) of the Act.

Conclusions of Law

1. The following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: News editors, assignment editors, senior writers, news writers, sports specialist, senior assignment desk assistants, talent coordinators, graphic artists, assignment desk assistants, graphics assistants, production assistants and telephone clerks in the news department of WPIX-TV.

EXCLUDED: All other employees in the News Department of WPIX-TV, including News Director, Executive Producer, Managing Editor, Producers, Metropolitan Editor, Graphics Director, Business Manager, administrative assistant (confidential secretary), all employees represented by other labor organizations, guards, watchmen and supervisors as defined in the Act.

2. At all times material herein, the Union has been the exclusive representative of all employees within the appropriate unit described above for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

3. By unilaterally implementing changes in terms and conditions of employment from 9 October 1986 and again from 1 April 1987, at which time no bargaining impasse existed, Respondent refused to bargain in violation of Section 8(a)(5) and (1) of the Act.

4. Respondent did not engage in unfair labor practices other than those found herein.

The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it be required to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Respondent having unilaterally implemented its last offer when it unlawfully declared impasse, it must make

the employees whole for loss of earnings and other benefits from 1 April 1987. Backpay shall be compiled in a manner consistent with *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd 44 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded, Inc.*, 283 NLRB No. 181 (1987). No backpay remedy is required for the failure to pay step up increases from October, 1986, as the parties have stipulated that these were paid shortly after 2 April 1987.

Upon the foregoing findings of fact and conclusions of law, upon the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER [10]

Respondent WPIX, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with the Union, by unilaterally implementing changes in terms and conditions of employment, in the absence of a bargaining impasse, of its employees in the appropriate unit described above.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived.

(a) Make all employees whole for any losses they may have suffered as a result of Respondent's unlawful unilateral changes in the terms and conditions of employment as of 1 April 1987 in the manner set forth in the Remedy section of the decision.

(b) Upon request from the Union, revoke any unilateral changes in wages or other conditions of employment and reinstate the terms and conditions of employment that obtained before the unilateral changes of 1 April 1987, provided that nothing herein shall be construed as requiring rescission of any wage or benefit increase heretofore granted to unit employees.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) On request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit described above with respect to rates of pay, wages, hours and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(e) Post at its facility copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms pro-

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[11] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

vided by the Regional Director for Region 2, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated: Washington, D.C. May 12, 1988

/s/ ELEANOR MACDONALD
Eleanor MacDonald
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF
THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF
THE UNITED STATES GOVERNMENT

AFTER A HEARING AT WHICH ALL SIDES HAD AN OPPORTUNITY TO PRESENT EVIDENCE AND STATE THEIR POSITIONS, THE NATIONAL LABOR RELATIONS BOARD FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, AND HAS ORDERED US TO POST THIS NOTICE.

Section 7 of the Act gives employees the following rights:

To engage in self-organization;
To form, join or assist any union;
To bargain collectively through representatives of their own choice;
To engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection;
To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain with NEWSPAPER GUILD OF NEW YORK, LOCAL 3, THE NEWSPAPER GUILD, AFL-CIO, CLC, by unilaterally changing wage rates and other terms and conditions of employment. The bargaining unit is:

INCLUDED: News editors, assignment editors, senior writers, news writers, sports specialist, senior assignment desk assistants, talent coordinators, graphic artists, assignment desk assistants, graphics assistants, production assistants and telephone clerks in the news department of WPIX-TV.

EXCLUDED: All other employees in the News Department of WPIX-TV, including News Director, Executive Producer, Managing Editor, Producers, Metropolitan Editor, Graphics Director, Business Manager, administrative assistant (confidential secretary), all employees represented by other labor organizations, guards, watchmen and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole all bargaining employees for any losses they may have suffered as a result of our unlawful unilateral changes in the terms and conditions of employment, with interest.

WE WILL, upon request from the Union, revoke any unilateral changes in terms and conditions of employment and reinstate the terms and conditions that obtained before our unlawful changes, although this does not mean that we must rescind any wage or benefit increase granted to unit employees.

WE WILL on request bargain collectively with the Union with respect to rates of pay, hours of employment and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

WPIX, INC.

(Employer)

Dated ---------- By ----------

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office. Jacob K. Javits Federal Building, Room 3614, 26 Federal Plaza, New York, New York 10278, Telephone (212) 264-0360.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

DOCKET NUMBER 89-4136, 89-4142

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 8 day of August, one thousand nine hundred and ninety

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NATIONAL LABOR RELATIONS BOARD,

Petitioner-Cross-Respondent,

v

WPIX, INC.,

Respondent-Cross-Petitioner,

NEWSPAPER GUILD OF NEW YORK,
LOCAL 3 AFL-CIO,

Intervenor.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for respondent-cross-petitioner, WPIX, INC.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk
by /s/ _____
Chief Deputy Clerk